Supreme Court, U.S.
FILED

09-436 SEP 14 2009

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL ANTHONY ROY,

Petitioner,

v.

THE STATE OF MINNESOTA,

Respondent.

On Petition for Writ of Certiorari
To The Minnesota Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE STATE OF MINNESOTA LACK SUBJECT-MATTER JURISDICTION OVER THE PRESENT CONTROVERSY BECAUSE POSSESSION OF FIREARMS IS "CIVIL-REGULATORY" IN THIS PARTICULAR CASE?

2. DOES THE PETITIONER HAVE A RIGHT TO POSSESS FIREARMSTHAT IS PROTECTED AS A RESERVED RIGHT IN THE 1854 AND 1855 TREATIES WITH THE CHIPPEWA?

3. DID THE MINNESOTA APPELLATE COURT IMPROPERTLY DENY REVIEWOF THIS MATTER BECAUSE THE MINNESOTA COURT OF APPEALS FAILED TO ADDRESS OR REVIEW THE RELEVANT AND APPLICABLE 1854 AND 1855 TREATIES WITH THE CHIPPEWA?

4. DO PETITIONER'S TREATY RIGHTS BELONG TO HIM AS AN INDIVIDUAL TRIBAL AS WELL AS A TRIBAL AND BAND MEMBER OF THE MINNESOTA CHIPPEWA TRIBE, AS WELL AS COLLECTIVELY TO THE BANDS THAT ARE SIGNATORY TO THE TREATIES OF 1854 AND 1855?

5. DOES THE PETITIONER HAVE A TREATY RIGHT TO POSSESS FIREARMS AS A PRE-EXISTING RIGHT IN LIGHT OF THIS COURT'S 2008 DECISION IN *UNITED STATES V. HELLER* (2008 WL 2520816)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner:

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PETITION

This case is distinguishable from all prior reviewed treaty rights cases involving an Indian in Indian Country under the Federal Gun Control Act of 1968, because Petitioner Roy's Tribe's treaties actually contain language and provisions for trade treaties which provided firearms to the Chippewa as part of the valuable consideration. Particularly, the 1854 and 1855 Treaties with the Chippewa were trades for lands that became Minnesota and Wisconsin. The 1854 Treaty consideration included "two hundred guns, one hundred rifles, . . . three hundred dollars' worth of ammunition, . . . to be distributed among the young men of the nation, at the next annuity payment.[1] Similarly, in the 1855 Treaty the United States provided for five (5) more annum payments for $300.00 worth of powder and $100.00 worth of shot and lead for the Chippewas' firearms.[2]

Petitioner is an enrolled member of the Minnesota Chippewa Tribe (MCT) who was residing on the Leech Lake (MCT) Reservation in the State of Minnesota, which is a Public Law 280 state, when he was charged and convicted under *state law* for being a state convicted felon in

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[1] Art. IV, Treaty with the Chippewa, 1854, Sept. 30, 1854, 10 Stat., 1109, Ratified Jan. 10, 1855, Proclaimed Jan. 29, 1855.

[2] Art. III, Treaty with the Chippewa, 1855, Feb. 22, 1855, 10 Stat., 1165, Ratified Mar. 3, 1855, Proclaimed Apr. 7, 1855.

possession of a firearm. Petitioner asserted a treaty right defense for possession of the firearm on the reservation as well as an inherent civil right as a tribal member to possess a firearm comparable to the individual right to bear arms as described in District of Columbia v Heller[3] for the Second Amendment. Petitioner was not engaged in any other criminal conduct when he was in possession of the firearm. The rifle was in its gun case, with a Leech Lake Reservation Hunting Permit, during hunting season on the Leech Lake Reservation.

These issues, which the Minnesota Court of Appeals failed to consider, research and analyze properly, are continuing to reoccur. A decision by this Court clarifying the state's authority to prosecute tribal members for the state offense of felon in possession of a firearm without infringing on actual Chippewa treaty rights without a proper Public Law 280(b) analysis of Congressional intent, is therefore necessary.

Gun possession, at least for Minnesota's Chippewa Bands, implicates sovereign rights reserved under Treaties with the Chippewa of 1854 and 1855 with the Untied States federal government— also the individual inherent right to bear arms as all people understood it at the time of the Second Amendment in District of Columbia v. Heller[4]—are in fact separate and distinct from the State of Minnesota and the United States. Minnesota v. Mille Lacs Band of

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[3] District of Columbia v. Heller, 554 U.S. __(2008)
[4] Id.

Chippewa Indians, 526 U.S. 172, 194-208 (1999) (affirming the existence of Chippewa usufructuary rights stemming from treaties). See also U.S. v Bressette and Nahgahnub, 761 F. Supp. 658, 662 (D. Minn. 1991), (the court concluded that the 1854 treaty reserved full usufructuary rights for the Chippewa and additionally concluded, as did the Voight[5] court, that the Chippewa also reserved full usufructuary rights on the territory ceded in 1842. The Court further noted that "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Bressette citing United States v Dion, 476 U.S. 734, 739-740, (1986) (emphasis added in Bressette).

The Minnesota Supreme Court denied review of the Minnesota Court of Appeals decision, which relied primarily on United States v. Gallaher, 275 F.3d 784, 789 (9th Cir. 2001); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1292 (7th Cir. 1974); and United States v. Fox, 557 F. Supp. 2d 1251, 1255 (D. N.M. 2007). However, none of these cases used in the Minnesota Court of Appeals decision involve Chippewa, or Chippewa treaties with the United States.

The Court of Appeals also ignored the part of Gallaher that clearly states that "In order to

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[5] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voight, 700 F.2nd 341, C.A. Wis., 1983

exempt tribal members from a federal law of otherwise general applicability, the treaty itself must specifically so provide." Gallaher citing United States v. Sohappy, 770 F.2d 816, 820 (9th Cir. 1985); United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1975). The Gallaher court found that the Colville Treaty contained no such specific, limiting language. Here, the Minnesota Court of Appeals has completely ignored the specific treaties cited by Appellant (1854 and 1855 Treaties with the Chippewa). See State v. Roy, A08-116, p. 5 (Add Westlaw cite).

The Minnesota Appellate Court also cited to a Wisconsin Appellate Court decision, State v. Jacobs, 735 N.W.2d 535 (Wis. Ct. App. 2007), as *similar*. However, in Jacobs the treaty tribe was the Stockbridge-Munsee tribe, not the Chippewas, so actually the case is not similar because the Wisconsin case involved a different Indian tribe, a different state, and different treaties with different and unique treaty terms.

In a recent cigarette trafficking case in Washington State, the Smiskin[6] Court noted that

> Federal laws of general applicability are presumed to apply with equal force to Indian tribes. See *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995); *United States v.*

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[6] See U.S. v. Smiskin, 487 F.3d 1260, 07 Cal. Daily Op. Serv. 5485, 2007 Daily Journal D.A.R. 7070, C.A.9 (Wash.), May 18, 2007 (NO. 05-30591, 05-30590)

Farris, 624 F.2d 890, 893 (9th Cir. 1980). We held in *Baker* that the CCTA is a law of general applicability. See 63 F.3d at 1484. There are three established exceptions, however, that preclude the application of an otherwise generally applicable federal law to Indian tribes. See id. at 1485; *Farris*, 624 F.2d at 893-94. The Smiskins argue that this case falls within the Indian treaty exception. As we explained in *Baker*, a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties."[7] 63 F.3d at 1485 (internal quotation marks omitted). ***Congress must therefore expressly apply a statute to Indians in order to abrogate their treaty rights***. See *Farris*, 624 F.2d at 893

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[7] "The other two exceptions, which do not apply here, arise if the statute is silent regarding applicability to Indian tribes and either: (1) the law touches "exclusive rights of self-governance in purely intramural matters" or (2) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians." Baker, 63 F.3d at 1485 (alteration in original)."

> ("[I]t is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians.").

(Id. at 5844)(Emphasis added). The actual Treaties with the Chippewa of 1854 and 1855 of Petitioner Roy's tribe must be considered by this Supreme Court because no State Court below addressed appellant's clearly articulated Public Law 280(b) defenses. When the Gun Control Act[8] is viewed as a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes [it] will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties." Id.

The critical question, then, is whether applying the State of Minnesota's felon in possession of firearm statute against Chippewa tribal members who possess a firearm on a treaty reservation violates the Chippewa Treaties of 1854 and 1855. The Court pointed out that

> The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in

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[8] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213

> the Indians' favor. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999) ("Mille Lacs Band"); see also *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect [tribal] interests . . . .").

(Id. at 5845-46). Certainly the Chippewa in the treaties of 1837, 1842, 1854 and 1855 would have understood that they had the inherent and individual right to bear firearms, for hunting, defense and other purposes, separate and distinct as their own sovereign nation. The recent Smiskin Court reiterated and declared that

> The Supreme Court's jurisprudence makes clear, however, that we must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made[9], and *Baker* addressed a

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[9] Id. Mille Lacs Band, 526 U.S. at 201-02 (noting that similar language in two treaties may have different meanings because the Court examines

> different tribe, a different treaty, and a different right.

Id. As such, the Supreme Court of the United States must look at the relevant treaties cited by Petitioner and which are applicable to these circumstances, especially because no other courts have done so. Then the Court would need to find evidence of where and when Congress *acted* to eliminate the Chippewas' treaty right to bear arms and also compensated the tribe for loss of the right. See Menominee Tribe of Indians v United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). (the Menominee Reservation was terminated but no mention of other treaty rights were included in the Congressional Act, and as such, the Menominee continue to enjoy the rights to hunt, fish and gather in the same exact territory of the original reservation boundaries, still today).

When Congress granted the State of Minnesota criminal jurisdiction under Public Law 280, that jurisdiction was expressly limited to preclude the infringement of "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or

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"the historical record and . . . the context of the treaty negotiations to discern what the parties intended by their choice of words"); Fishing Vessel, 443 U.S. at 675 ("Accordingly, it is the intention of the parties . . . that must control any attempt to interpret the treaties.").

regulation thereof." Public Law 83-280, 67 Stat. 588-89 (1953) (codified as amended at 18 U.S.C. § Section 1162(a) (1994)).

This Court has never considered whether the state can strip a tribal member of an inherent and separate *civil right* guaranteed by another sovereign nation—his Indian tribe—and then prosecute him under *state law* for exercising that right on that Sovereign's territory. Effectively, that is what occurred in this case, a complete failure to follow all of Public Law 280, not just section (a) which grants some jurisdiction, but also section (b) which requires examining federal laws, federal statutes, and treaties as sources of exceptions to state jurisdiction. By virtue of a *state* conviction, Roy was prosecuted for possessing a firearm in Indian Country, a right guaranteed to him not by the state government, but by the treaties of his Chippewa Tribe, a separate sovereign. Recently, in United States v. Lara, 541 U.S. 193 (2004), the United States Supreme Court recognized the continuing vitality of the principle that Indian tribes are separate sovereigns. See id. at 210 (holding that Double Jeopardy protections were not implicated by separate federal and tribal prosecutions because a tribal prosecution is not merely an extension of federal power, but a prosecution by a separate sovereign entity).

In this respect, Roy's case presents very different circumstances than those at issue in all the other Indian "on-reservation" Supreme Court cases, because they dealt with treaties void of firearms, express hunting and gathering rights,

and they were pre-Heller (supra). Consequently, those other decisions concluded that Indians still had on-going hunting rights without firearms and no diminishment of tribal treaty rights. Here, the Chippewa treaties express a right to firearms and ammunition and who was to get them was self-regulated by the bands and headmen according to the Treaties. In fact Chippewa treaties provided tens of thousands of dollars for "just engagements" to push the Lakota Sioux out of the region.[10]

Additionally, the United States Supreme Court determined in District of Columbia v. Heller that the Second Amendment guarantees the individual right to possess and carry weapons[11] which the Second Amendment codified as a pre-existing right.[12] Here, Heller recalled back to the time of Revolutionary War when everyone had weapons for all kinds of purposes, offensive, defensive and for hunting.[13] These are the same broad purposes and principles that Indians would have used to view their inherent right to bear arms and how Indians would have understood the rights of the individual to bear arms. This same concept of each, individual, Chippewa's right to bear arms is inextricably tied to usufructuary (inherent and treaty) harvesting rights of the Chippewa bands, which were expressly retained

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[10] See Arts. 4 and 12, Treaty with the Chippewa 1854 and Art. 3, Treaty with the Chippewa, 1855.
[11] Heller, 2008 WL 2520816 (U.S.)) at 10
[12] Id.
[13] Id. At 14.

and not surrendered in any treaty, nor taken away by any Act of Congress as required.

Minnesota is a "Public Law 280" state. Applying the traditional test for differentiating between criminal and civil/regulatory laws for the purpose of state-court jurisdiction—the test articulated by the United States Supreme Court in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987), the statute defining the offense of felon in possession is more consistent with a civil/regulatory statute than a criminal statute.[14] The structure of the statute alone suggests that it is civil/regulatory. See Cabazon, 480 U.S. at 211 n.10 (in categorizing a law as criminal or regulatory, a court must examine the law in detail). Unlike a typical criminal statute, Minn. Stat. § 609.165 does not simply define an offense and provide a penalty. Instead, the statute primarily concerns the restoration of civil rights after a person has been convicted of a criminal offense.[15] The statute details how and when civil rights are to be restored. It identifies the civil rights that are restored by Minnesota. It specifies what the order of discharge must contain. And in addition to the explicit prohibition on firearms possession, the statute contains a few exceptions to this prohibition, which are noted in two separate subsections of the statute.

Moreover, the statute's emphasis on "civil rights" again raises the question of whether a

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[14] Minn. Stat. § 609.165

[15] Id. See Appendix

state civil right is separate and distinct from a tribal civil right, which is inherent and treaty based for the Chippewa. Because there is such a distinction, the state lacks subject matter jurisdiction under Pub. L. 280(b) to enforce the statute against Petitioner Roy. Because Petitioner's case presents an issue of first impression that will have state and national impact, resolution of the issue by this Court is absolutely necessary.

Finally, the district revoked Petitioner's Stay of Execution because he had exhausted his state appeal rights and told him he could seek his Stay at the United State Supreme Court. Consequently, Petitioner has been forced to begin his sentence with regard to the State's felon-in-possession conviction and is presently incarcerated. As such, a Habeas Petition will need to be filed.

Accordingly, this Court must grant a Writ of Certiorari.

CONCLUSION

Petitioner respectfully prays and requests that his Writ of Certiorari be granted in this case, to review the decision of the Minnesota Court of Appeals because the legal analysis in the Minnesota decision is void of any relevant and meaningful Public Law 280(b) treaty analysis of the actual Treaties as cited and provided by Petitioner, particularly the 1854 and 1855 Treaties with the Chippewa, wherein the actual valuable consideration traded for lands that

became Minnesota included "two hundred guns, one hundred rifles, . . . three hundred dollars' worth of ammunition, . . . to be distributed among the young men of the nation, at the next annuity payment.[16]

The United States knew the Chippewa had guns, wanted guns, traded for guns with other people and nations, such as the United States, the French, and other tribes and bands. The United States employed the Chippewa against the Sioux.[17] Here, the Minnesota courts are intentionally ignoring the Petitioner's clearly stated defenses, treaty rights, and right to bear arms like Heller, but from the treaty bands of the Minnesota Chippewa Tribe. In fact the Minnesota Court of Appeals noted Petitioner's defense[18] and then completely avoided any analysis of those same treaties. Instead, Minnesota asserts jurisdiction in direct violation of treaty provisions and the limited Congressional grants of jurisdiction to the states in Public Law 280. The Minnesota Court of Appeals decision relied on and piggy-backed on federal prosecutions under the Federal Gun Control Act in other states, with

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[16] Art. IV, Treaty with the Chippewa, 1854, Sept. 30, 1854, 10 Stat., 1109, Ratified Jan. 10, 1855, Proclaimed Jan. 29, 1855.

[17] See FN 7, Art. IV, Treaty with the Chippewa, 1854, Sept. 30, 1854, 10 Stat., 1109, Ratified Jan. 10, 1855, Proclaimed Jan. 29, 1855 compensation for just engagements.

[18] See page 6 of Minn. App. Decision dated May 15, 2009 in Appendix.

other Indians, and involving different treaties with different and unique terms. Yet Minnesota's courts choose to ignore more relevant Congressional Acts like the exceptions to the grant of state jurisdiction in Public Law 280(b).

Petitioner has lost his liberty under a state judicial system avoiding his express defenses and very respectfully requests that his Writ of Certiorari be granted as the Petitioner's treaty and Public Law 280 defenses deserve actual, honest and intellectual analysis by the Supreme Court of the United States, as his liberty is at stake.

Respectfully submitted,

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STATE OF MINNESOTA JUDGEMENT

State of Minnesota, Respondent,
vs.
Joel Anthony Roy, Appellant.

Court of Appeals
Appellate Court # A08-116
Trial Court # 04-K1-06-1026

Pursuant to a decision of Court of Appeals daily made and entered, it is determined and adjudged that the decision of the Beltrami county District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: June 15, 2009

FOR THE COURT

Attest: s/Frederick K. Grittner
Clerk of the Appellete Courts

By: s/Mona Lennas
Assistant Clerk

STATE OF MINNESOTA COURT OF APPEALS

TRANSCRIPT OF
JUDGEMENT

I, Frederick K. Grittner, Clerk of the Appellate courts, do herby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office: that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul June 15, 2009
Dated

s/Frederick K. Grittner
Clerk of the Appellate Courts

By: s/Mona Lennas
Assistant Clerk

STATE OF MINNESOTA

IN SUPREME COURT

A08-116

OFFICE OF

APPELLATE COURTS

MAY 19 2009

FILED

State of Minnesota,

Respondent,

vs.

Joel. Anthony Roy,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the motion of Joel Anthony Roy to proceed in forma pauperis be, and the same is, granted.

IT IS FURTHER ORDERED that the petition of Joel Anthony Roy for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the motion of Joel Anthony Roy to accept his nonconforming page-length petition for further review be, and the same is, denied as unnecessary.

Dated: May 19, 2009 BY THE COURT

s/Eric J. Magnuson

Eric J. Magnuson

Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0116

State of Minnesota,
Respondent,

vs.

Joel Anthony Roy,
Appellant.

Filed March 3, 2009
Affirmed
Hudson, Judge

Beltrami County District Court
File No. 04-K1-06-1026

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Timothy Faver, Beltrami County Attorney, Randall Burg, Assistant County Attorney, Judicial Center, 600 Minnesota Avenue Northwest, Suite 400, Bemidji, Minnesota 56601-3037 (for respondent)

Frank Bibeau, Christopher Allery, Anishinabe Legal Services, P.O. Box 157, Cass Lake, Minnesota 56633 (for appellant)

Considered and decided by Larkin, Presiding

Judge; Hudson, Judge; and Collins, Judge.*

SYLLABUS

Under Public Law 280, Minnesota has jurisdiction to prosecute a tribal member for a violation of the felon-in-possession statute, Minn. Stat. § 609.165 (2004), because: (a) the inability to possess a firearm under Minn. Stat. § 609.165 is the result of the individual's criminal conduct; (b) the prosecution does not affect the tribe's treaty hunting rights; and (c) Minn. Stat. § 609.165 is criminal/prohibitory.

OPINION

HUDSON, Judge

Appellant, an enrolled member of an Indian tribe and a resident of a reservation, challenges his conviction of being a felon in possession of a firearm in violation of Minn. Stat. § 609.165. Because we conclude that Public Law 280 grants the state subject-matter jurisdiction to enforce Minn. Stat. § 609.165 against a tribal member on a reservation, we affirm.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Appellant Joel Anthony Roy is a member of the Minnesota Chippewa Tribe (MCT), enrolled at the Fond du Lac reservation, and resides within the exterior boundaries of the Leech Lake reservation.

In 2002, appellant was convicted of terroristic threats, a felony and a crime of violence. Minn. Stat. §§ 609.173 (prohibiting terroristic threats), 624.712, subd. 5 (defining crime of violence) (2000). Appellant's sentence was stayed, and he was placed on probation. He was discharged from felony probation on the terroristic threats conviction on May 30, 2006.

In October 2005, investigators with the Minnesota Bureau of Criminal Apprehension learned that appellant possessed a semi-automatic assault rifle. Appellant admitted that he possessed the rifle and stored it in a closet at his residence. He gave law enforcement permission to search his home for the rifle, but they did not find the rifle. During the search, appellant received a telephone call from a friend who stated that she had removed the rifle from appellant's residence. The rifle was subsequently retrieved.

At the time, appellant possessed a hunting license from the Leech Lake Band of Ojibwe for use within the boundaries of the Leech Lake reservation.

In June 2006, appellant was charged with being a felon in possession of a firearm, in violation of Minn. Stat. § 609.165. He moved to

dismiss the charge for lack of subject-matter jurisdiction, arguing that the state lacked jurisdiction to enforce the statute because appellant is a member of the MCT and the offense occurred within the boundaries of the Leech Lake reservation. The district court denied his motion to dismiss. Appellant renewed his motion, but the district court denied it again. Following a *Lothenbach* trial, appellant was found guilty of being a felon in possession of a firearm. This appeal, challenging the district court's denial of appellant's motion to dismiss for lack of subject-matter jurisdiction, follows.

ISSUE

Does the state have subject-matter jurisdiction to prosecute a tribal member for a violation on a reservation of the felon-in-possession statute, Minn. Stat. § 609.165?

ANALYSIS

Whether the state has jurisdiction to enforce its laws against a Native American living on an Indian reservation who commits an offense on the reservation is an issue that this court reviews de novo. *State v. Busse*, 644 N.W.2d 79, 82 (Minn. 2002).

"State court jurisdiction over matters involving Indians is governed by federal statute or caselaw." *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997). Indian tribes retain "attributes of sovereignty over both their members and their

Farris, 624 F.2d 890, 893 (9th Cir. 1980). We held in *Baker* that the CCTA is a law of general applicability. See 63 F.3d at 1484. There are three established exceptions, however, that preclude the application of an otherwise generally applicable federal law to Indian tribes. See id. at 1485; *Farris*, 624 F.2d at 893-94. The Smiskins argue that this case falls within the Indian treaty exception. As we explained in *Baker*, a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties."[7] 63 F.3d at 1485 (internal quotation marks omitted). ***Congress must therefore expressly apply a statute to Indians in order to abrogate their treaty rights***. See *Farris*, 624 F.2d at 893

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[7] "The other two exceptions, which do not apply here, arise if the statute is silent regarding applicability to Indian tribes and either: (1) the law touches "exclusive rights of self-governance in purely intramural matters" or (2) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians." Baker, 63 F.3d at 1485 (alteration in original)."

> ("[I]t is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians.").

(Id. at 5844)(Emphasis added). The actual Treaties with the Chippewa of 1854 and 1855 of Petitioner Roy's tribe must be considered by this Supreme Court because no State Court below addressed appellant's clearly articulated Public Law 280(b) defenses. When the Gun Control Act[8] is viewed as a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes [it] will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties." Id.

The critical question, then, is whether applying the State of Minnesota's felon in possession of firearm statute against Chippewa tribal members who possess a firearm on a treaty reservation violates the Chippewa Treaties of 1854 and 1855. The Court pointed out that

> The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in

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[8] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213

> the Indians' favor. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999) ("Mille Lacs Band"); see also *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect [tribal] interests . . . .").

(Id. at 5845-46). Certainly the Chippewa in the treaties of 1837, 1842, 1854 and 1855 would have understood that they had the inherent and individual right to bear firearms, for hunting, defense and other purposes, separate and distinct as their own sovereign nation. The recent Smiskin Court reiterated and declared that

> The Supreme Court's jurisprudence makes clear, however, that we must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made[9], and *Baker* addressed a

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[9] Id. Mille Lacs Band, 526 U.S. at 201-02 (noting that similar language in two treaties may have different meanings because the Court examines

> different tribe, a different treaty, and a different right.

Id. As such, the Supreme Court of the United States must look at the relevant treaties cited by Petitioner and which are applicable to these circumstances, especially because no other courts have done so. Then the Court would need to find evidence of where and when Congress *acted* to eliminate the Chippewas' treaty right to bear arms and also compensated the tribe for loss of the right. See Menominee Tribe of Indians v United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). (the Menominee Reservation was terminated but no mention of other treaty rights were included in the Congressional Act, and as such, the Menominee continue to enjoy the rights to hunt, fish and gather in the same exact territory of the original reservation boundaries, still today).

When Congress granted the State of Minnesota criminal jurisdiction under Public Law 280, that jurisdiction was expressly limited to preclude the infringement of "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or

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"the historical record and . . . the context of the treaty negotiations to discern what the parties intended by their choice of words"); Fishing Vessel, 443 U.S. at 675 ("Accordingly, it is the intention of the parties . . . that must control any attempt to interpret the treaties.").

Appellant also directs this court to a Wisconsin case, *State v. Lemieux,* 327 N.W.2d 669 (Wis. 1983). There, the Wisconsin Supreme Court concluded that a statute, which prohibited possession or transportation of a loaded, uncased weapon in a vehicle and prohibited firing a weapon from a vehicle, "regulate[d] hunting" and "impermissibly infringe[d] upon . . . treaty-guaranteed hunting rights." *Id.* at 674. Thus, the court held that the state lacked jurisdiction to enforce the statute against two enrolled members of the Chippewa tribe. *Id.* But *Lemieux* is distinguishable because the statute at issue in *Lemieux* "was primarily a hunting regulation." *State v. Folstrom,* 331 N.W.2d 231, 234 n.3 (Minn. 1983) (distinguishing *Lemieux* from the facts in *Folstrom,* which involved possession of pistol without permit).

Moreover, the Wisconsin Court of Appeals recently rejected an argument similar to the one that appellant makes here. *State v. Jacobs,* 735 N.W.2d 535 (Wis. Ct. App. 2007). In *Jacobs,* the Wisconsin Court of Appeals concluded that the circuit court had subject-matter jurisdiction over Jacobs where a Wisconsin statute prohibited Jacobs, who was a tribal member on a reservation, from possessing a firearm. *Id.* at 536. Like appellant here, Jacobs argued that the state lacked jurisdiction to enforce the statute against him because "he was exercising his tribal hunting rights, protected by treaty and exempt from State regulation." *Id.* The Wisconsin Court of Appeals rejected this argument, noting that the statute in question " . . . is not specifically a hunting

restriction or regulation but, rather, a generally applicable, neutral criminal statute." *Id.* The court concluded that any effect the Wisconsin statute had on Jacobs' hunting rights was incidental, explaining that the "application of [the statute] does not, in and of itself, make Jacobs' exercise of treaty hunting rights illegal. Rather, Jacobs' own actions in committing a felony have limited him from fully enjoying those rights." *Id.*

The facts in *Jacobs* mirror those presented here, and because *Lemieux* is distinguishable, we conclude that *Jacobs* is more instructive. The State of Minnesota has not made the exercise of a treaty right illegal. Rather, like the appellant in *Jacobs,* it is appellant's own criminal conduct in committing a crime of violence which has limited his ability to lawfully possess a firearm and collaterally impacted his ability to enjoy his tribe's treaty hunting rights. Accordingly, nothing in section (b) to Public Law 280, as codified at 18 U.S.C. § 1162(b), bars the state from enforcing Minn. Stat. § 609.165 against him.

II

Public Law 280

Having addressed appellant's treaty-rights argument, we next consider whether Minnesota has jurisdiction to enforce Minn. Stat. § 609.165 under the general grant of criminal jurisdiction in Public Law 280. To determine whether Minnesota

has jurisdiction under Public Law 280 to enforce a state law in Indian country, Minnesota courts use the analytical framework approved by the United States Supreme Court in *Cabazon*. *Stone*, 572 N.W.2d at 728. *Cabazon* instructs that

> when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation . . . or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

480 U.S. at 208, 107 S. Ct. at 1088. In making this determination, laws are classified as state "criminal/prohibitory" laws or state "civil/regulatory" laws. *Id.* at 209, 107 S. Ct. at 1088. There is no bright-line distinction between the classifications, and "[t]he applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory." *Id.* at 211 n.10, 107 S. Ct. at 1089 n. 10.

The Minnesota Supreme Court has adopted a two-step test to determine, under *Cabazon*, whether a law is criminal/prohibitory or civil/regulatory. *Stone*, 572 N.W.2d at 730; *see also Jones*, 729 N.W.2d at 5 (explaining the application of the *Cabazon/Stone* test). The first step is to determine the focus of the analysis, that is,

whether the concern is the broad conduct or the specific, narrow conduct at issue. *Stone*, 572 N.W.2d at 730. "[U]nless the narrow conduct presents substantially different or heightened public policy concerns," the broad conduct is the focus. *Id.*

After determining the proper focus, the second step is to determine if the conduct at issue is generally permitted but subject to regulation, or if it is generally prohibited. *Id.* Conduct is civil/regulatory if it is generally permitted, subject to exceptions; and conduct is criminal/prohibitory if it is generally prohibited. *Id.* In addition, "in close cases," courts are "aided by *Cabazon's* 'shorthand public policy test,' which provides that conduct is criminal if it violates the state's public policy." *Id.* Four nonexclusive factors are used to determine whether an activity violates the state's public criminal policy:

> (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others;
> (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; (4) the nature and severity of the potential penalties for a violation of the law.

Id.

Applying this analytical framework, we must determine whether Minn. Stat. § 609.165 is criminal/prohibitory or civil/regulatory.

Recently, we addressed this exact issue in an unpublished opinion in *State v. Bellanger*, No. A06-1907, 2007 WL 4472287, at *1–*2 (Minn. App. Dec. 24, 2007), *review denied* (Minn. Mar. 18, 2008), and concluded that Minn. Stat. § 609.165 was criminal/prohibitory. Although not precedential, we find the reasoning in *Bellanger* to be persuasive, and we adopt it here. *See* Minn. Stat. § 480A.08, subd. 3 (2008) ("[U]npublished opinions of the court of appeals are not precedential."); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (holding that unpublished opinions may be persuasive).

In *Bellanger*, we held that Minn. Stat. § 609.165 was criminal/prohibitory, and that, therefore, under Public Law 280, Minnesota had jurisdiction to enforce Minn. Stat. § 609.165 against a tribal member living on a reservation. *Bellanger*, 2007 WL 4472287, at *2. Applying the Cabazon/Stone framework and comparing Minn. Stat. § 609.165 to the statutes involved in two other cases, we concluded that "the narrow conduct is the possession of firearms by a convicted felon, and the broad conduct is the possession of possession of firearms by citizens in general,." Id. at *2. In reaching this conclusion, we also relied on the direction given by our supreme court in *State v. Jones*, 729 N.W.2d 1 (Minn. 2007) and *State v. Busse*, 644 N.W.2d 79 (Minn. 2002).

In *Busse*, four factors were used to

determine whether the narrow conduct at issue presented heightened public policy concerns: (1) the criminal sanction imposed, (2) the direct threat to physical harm, (3) the need for the state to be able to enforce charges of driving after cancellation based on a threat to public safety, and (4) the absence of exceptions. 644 N.W.2d at 87. Examining these four factors in *Bellanger*, we concluded that the narrow conduct of felons possessing firearms presented heightened public policy concerns and that the narrow conduct should, therefore, be the focus of the analysis. 2007 WL 4472287, at *2. We explained:

> The criminal sanction imposed is imprisonment of not more than 15 years, a fine of not more than $30,000, or both. Minn. Stat. § 609.165, subd. 1b(a) (2004). The direct threat to physical harm by having convicted felons possess firearms is obvious, as is the need for the state to be able to enforce the prohibition on felons' possession of firearms. Finally, the only exception is for felons to whom the court has restored the right to possess firearms. Minn. Stat. § 609.165, subd. 1d (2004).

Id.

Moreover, in *Jones*, the Minnesota Supreme Court examined the legislative history of the

statute at issue there and noted that the public policy concerns had grown over time, as evidenced by the increased offense grade. 729 N.W.2d at 7. Likewise, the public policy concerns surrounding felons possessing firearms has increased over time, as evidenced by the fact that the legislature changed the ten-years-after-expiration-of sentence prohibition on convicted felons possessing firearms to a lifetime prohibition. *Compare* Minn. Stat. § 624.713, subd. 1(b) (2002) *with* Minn. Stat. § 624.7 13, subd. 1(b) (Supp. 2003).

Busse, Jones, and the reasoning in *Bellanger* lead us to conclude that the proper focus of our analysis is on the narrow conduct because the possession of a firearm by a felon presents substantially different or heightened public policy concerns.

Having determined the proper focus, the next step in our analysis requires us to determine whether the conduct is generally permitted or generally prohibited. *Stone,* 572 N.W.2d at 730. The conduct at issue here is generally prohibited, because, as we reasoned in *Bellanger,* "the only exception is for felons to whom the court has restored the right to possess firearms." *Bellanger,* 2007 WL 4472287, at *2 (citing Minn. Stat. § 609.165, subd. 1d). Therefore, we hold that Minn. Stat. § 609.165 is criminal/prohibitory.

Our holding that Minn. Stat. § 609.165 is criminal/prohibitory is also supported by application of *Cabazon's* shorthand public policy test. *Stone,* 572 N.W.2d at 730 (listing four nonexclusive factors of *Cabazon's* shorthand public policy test). First, the conduct at issue

"directly threatens physical harm to persons or property or invades the rights of others." *Id.* The statute prohibiting individuals convicted of crimes of violence from possessing firearms is "'designed to protect the public safety by keeping firearms out of the hands of convicted criminals who have committed crimes which, in the legislature's judgment, are indications of future dangerousness.'" *State v. Anderson,* 720 N.W.2d 854, 861 (Minn. App. 2006) (quoting *State v. Moon,* 463 N.W.2d 517, 520 (Minn. 1990)), *aff'd,* 733 N.W.2d 128 (Minn. 2007). And we reiterate our comments in *Bellanger,* in that "[t]he direct threat to physical harm by having convicted felons possess firearms is obvious, as is the need for the state to be able to enforce the prohibition on felons possession of firearms." 2007 WL 4472287, at *2. Second, as previously noted, the exception to the prohibition is limited. Third, appellant is blameworthy; he was convicted of a crime of violence, and he was therefore unable to lawfully possess a firearm. Moreover, appellant has not suggested that he was unaware of this prohibition or that he petitioned for judicial restoration of his ability to possess a firearm. The fourth factor in the shorthand public policy test is the nature and severity of the potential penalties for violation of the law. *Stone,* 572 N.W.2d at 730. A person convicted of a crime of violence and who possesses a firearm is guilty of a felony, which is punishable with "imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both." Minn. Stat. § 609.165, subd. 1b(a). These factors, viewed together, demonstrate that

possession of a firearm by a felon who was convicted of a crime of violence violates the state's criminal public policy.

The Minnesota Supreme Court's decision in *Folstrom* further supports our conclusion that Minn. Stat. § 609.165 is criminal/prohibitory. There, the court held that Minnesota had jurisdiction to enforce a statute that prohibited carrying a pistol without a permit against the appellant, a member of the White Earth Band of Chippewa Tribes, even though the offense occurred while the appellant was in Indian country. *Folstrom,* 331 N.W.2d at 234. *Folstrom* is still good law, as our supreme court explained in *Stone:*

> *State v. Folstrom,* 331 N.W.2d 231 (1983), decided before *Cabazon,* held that Minn. Stat. § 624.714 (1982), prohibiting carrying a pistol without a permit, was a criminal law for purposes of Public Law 280. This determination was based on the fact that the law was located in the criminal code and contained a criminal penalty. However, in dicta, this court also found that the law would be criminal under the prohibitory/regulatory *(Cabazon)* test. *Id.* at 233, fn. 1. Therefore, *Folstrom* remains good law.

572 N.W.2d at 730 n.4. *Folstrom* is instructive because the statute at issue in *Folstrom* was similar to the one at issue here, in that both

prohibit possession of a firearm under certain circumstances.

Based on the application of the *Cabazon/Stone* analytical framework and the persuasive reasoning in *Bellanger*, we conclude that Minn. Stat. § 609.165 is criminal/prohibitory and accordingly, under Public Law 280, Minnesota has jurisdiction to enforce Minn. Stat. § 609.165 against appellant.

III

Finally, appellant appears to suggest that our jurisdictional analysis must take into account *R.M.H.*, 617 N.W.2d 55, the so-called *Duro* fix, and the United States Supreme Court's subsequent decision in *United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628 (2004).

In *R.M.H.*, the Minnesota Supreme Court addressed the issue of whether the state has jurisdiction to enforce its speeding and driver's license laws against a nonmember Indian.[2] 617 N.W.2d at 57. The court determined, first, that Congress had not expressly consented to Minnesota's jurisdiction over R.M.H.'s traffic offenses, explaining that the offenses were "civil/regulatory" and did not fit with the express grant of jurisdiction to Minnesota in Public Law 280. *Id.* at 60. Next, the court considered whether Minnesota could exercise jurisdiction absent an

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[2] The court in R.M.H. defined a "nonmember Indian" as "an Indian who is not an enrolled member of the governing tribe." R.M.H., 617 N.W.2d at 61.

express grant by determining whether federal law preempted state jurisdiction. *Id.* The court explained that the "regulation of nonmember Indians warrants different consideration than does regulation of member Indians," *id.* at 63, and that concerns related to tribal sovereignty are strongest when a state threatens the "tribal self-government, self-sufficiency, and economic development," *id.* at 64–65. The court concluded that regulation of traffic offenses against nonmembers did not threaten the tribal interest in self-governance, economic development, or self-sufficiency. *Id.* at 65. Finally, the court noted that federal law does not regulate traffic offenses in a manner that precludes state jurisdiction. *Id.* Thus, the supreme court concluded that "Minnesota's interests, when compared with the federal interests, are more than sufficient to justify state jurisdiction over civil/regulatory traffic offenses committed on a state highway on an Indian reservation by an Indian who is not an enrolled member of the governing tribe." *Id.*

In *R.M.H.*, the Minnesota Supreme Court relied, in part, on the United States Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053 (1990). *Id.* at 61–65. In *Duro*, the United States Supreme Court held that a tribe did not possess inherent or sovereign authority to prosecute a nonmember Indian. 495 U.S. at 691–92, 110 S. Ct. at 2063.

Soon after *Duro*, Congress enacted new legislation authorizing tribes to exercise criminal jurisdiction over all Indians, including nonmembers. *Lara*, 541 U.S. at 197–98 124 S. Ct.

at 1632. Subsequently, the United States Supreme Court recognized that *Duro,* along with several other decisions, was no longer determinative in light of the newly enacted legislation which "relax[ed] restrictions on the bounds of the inherent tribal [prosecutorial] authority that the United States recognizes." *Id.* at 207, 124 S. Ct. at 1637.

Relying on *Lara,* appellant argues that *R.M.H.* is no longer good law. But appellant's argument is not clear or thoroughly developed. For example, appellant does not explain why his argument is relevant in light of our conclusion that Minn. Stat. § 609.165 is criminal/prohibitory. And to the extent that appellant claim is that the legislation passed in response to *Duro* divested the state of Minnesota of criminal jurisdiction over offenses committed by or against Indians in Indian country, we note that appellant has not cited any authority establishing that 18 U.S.C. § 1162 is no longer viable. Indeed, there is persuasive authority to the contrary. *See United States v. Person,* 427 F. Supp. 2d 894, 904–05 (D. Minn. 2006) (rejecting an argument that section 1162 was no longer viable in light of the legislation passed in response to *Duro).* Accordingly, we reject appellant's argument and defer to the Minnesota Supreme Court for any re-evaluation of whether *R.M.H.* remains good law. *See Terault v. Palmer,* 413 N.W.2d 283, 286 (Minn. App. 1987) ("The task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court. "), *review denied* (Minn. Dec. 18, 1987).

DECISION

The state has subject-matter jurisdiction under Public Law 280 to enforce Minn. Stat. § 609.165 against a tribal member on a reservation because the enforcement of Minn. Stat. § 609.165 does not affect the collective hunting rights of a tribe; appellant's inability to lawfully possess a weapon is the incidental result of his own conduct; and because Minn. Stat. § 609.165 is criminal/prohibitory.

Affirmed.

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

Case No. K1-06-1026

FILED

OCT 03 2007

District Court

Beltrami County

Minnesota

State of Minnesota,

Plaintiff,

v.

Joel Anthony Roy,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Esq. with his client, Joel Anthony Roy; and David Frank, Esq., Assistant Beltrami County Attorney, on behalf of the State, Mr. Roy informed the Court that he wished to waive his right to jury trial, cross-examination, and presentation of evidence and requested that this matter be submitted for a trial by the Court in the manner proscribed by the Minnesota Supreme Court in *State v. Lothenbach.* 296 N.W.2d 854 (Minn. 1980).

The Court obtained Mr. Roy's oral waivers on the record. The State filed the certified copy of Mr. Roy's conviction with the Court and indicated the State intended to rely upon a verified copy of the complaint and the certified copy of the conviction in this matter. In addition, the Court also received the Constitution and Bylaws of the Minnesota Chippewa Tribe, a letter from the Minnesota Department of Revenue to the Minnesota Chippewa Tribe, a map of Indian Land Cession and Reservations of 1858 and a copy of an Order in the case of State of Minnesota v. Jennifer Sue Moore issued by the Honorable John P. Smith of Cass County, Minnesota. Based upon the filed disclosures submitted, the Court makes the following:

FINDINGS OF FACT

1. On January 22, 2002 Joel Anthony Roy was convicted of the crime of violence, Terroristic Threats, a felony, in Clearwater County

District Court. Mr. Roy was sentenced to 18 months in prison, but execution of that sentence was stayed as a result of this conviction. Mr. Roy was placed on probation, given credit for the time he served in jail and required to complete probationary obligations.

2. Joel Anthony Roy was discharged from felony probation on the Terrorist Threats conviction on May 30, 2006.

3. On October 21, 2005, Investigators with the Minnesota Bureau of Criminal Apprehension were involved in the investigation of a gunshot victim homicide at 16678 64th Avenue in Cass Lake, Minnesota. During the investigation, a number of spent 7.62 x 39mm ammunition, ammunition used for semi-automatic assault rifles such as the AK-47 or SKS rifle, cases were found.

4. Investigators learned that Joel Roy, a neighbor of one of the suspects in the shooting, possessed a SKS rifle.

5. When questioned by law enforcement during their homicide investigation, Joel Roy admitted to Special Agent Phil Hodapp of the Minnesota Bureau of Criminal Apprehension that he possessed a SKS rifle and stored it in a closet at his residence.

6. Joel Roy took Special Agent Phil Hodapp and Special Agent Stan Leach to his residence, giving the Agents permission to search for the firearm. The rifle was not found. During the search for the firearm, Mr. Roy received a telephone call from Mia Thompson stating that she removed the rifle from Roy's residence to take it to a friend's house next door. Special Agent Hodapp then retrieved the firearm from Ms. Thompson.

7. Joel Roy is an enrolled member of the Fond du Lac Band of Chippewa Indians.

8. The Leech Lake Band of Ojibwe did issue Mr. Roy a hunting license to be used within the boundaries of the Leech Lake Indian Reservation.

9. The possession of the firearm took place within the exterior boundaries of the Leech Lake Indian Reservation.

10. As to the charge of Felon in Possession of a Firearm in violation of Mintz. Stat. §609.165, subd. 1b(a) State has proven the following beyond a reasonable doubt: That the Defendant, Joel Roy, possessed a firearm after having been convicted of a crime of violence, to wit: Terroristic Threats. Defendant's act took place on or about October 21, 2005 in the County of Beltrami, State of Minnesota.

CONCLUSIONS OF LAW

1. The Defendant is guilty of Felon in Possession of a Firearm in violation of Minn. Stat. § 609.165, subd. 1 b(a).

IT IS HEREBY ORDERED:

1. A Pre-sentence Investigation shall be completed and this matter shall come back before the Court for sentencing on the 5th day of November, 2007 at 9:00 a.m., at the Beltrami County Courthouse, Bemidji. Minnesota.

Dated: October 3, 2007.

s/ Shari R. Schluchter

Judge of District Court

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

Case No. K1-06-1026

FILED

JUL 02 2007

DISTRICT COURT

BELTRAMI COUNTY

MINNESOTA

State of Minnesota,

Plaintiff,

vs. **AMENDED ORDER**

Joel Anthony Roy,

Defendant.

The above-entitled matter came on for an omnibus hearing before the undersigned on December 5, 2006 pursuant to Defendant's motion to dismiss the charge of Felon in Possession of a

Firearm in violation of Minn. Stat. §609.165. Randall R. Burg, Assistant Beltrami County Attorney, appeared on behalf of Plaintiff. Frank W. Bibeau, Esq. appeared with and on behalf of Defendant.

A hearing was held before the undersigned on April 30, 2007, pursuant to Defendant's renewed motion to dismiss for lack of subject matter jurisdiction. Randall R. Burg, Assistant Beltrami County Attorney, appeared on behalf of Plaintiff. Frank W. Bibeau, Esq. appeared with and on behalf of Defendant.

Based upon the arguments of counsel, the files and records herein and applicable law, the Court makes the following:

FINDINGS OF FACT

1. On October 21, 2005, Investigators with the Minnesota Bureau of Criminal Apprehension were involved in the investigation of a gunshot victim homicide at 16678 64th Avenue in Cass Lake, Minnesota. During the investigation, a number of spent 7.62 x 39mm ammunition, ammunition used for semi-automatic assault rifles such as the AK-47 or SKS rifle, cases were found.

2. Investigators learned that Defendant, a neighbor of one of the suspects in the shooting,

3. When questioned by law enforcement during their homicide investigation. Joel Roy admitted to Special Agent Phil Hodapp of the Minnesota Bureau of Criminal Apprehension that he possessed a SKS rifle and stored it in a closet at his residence.

4. The Defendant took Special Agent Phil Hodapp and Special Agent Stan Leach to his residence, located on the Leech Lake Indian Reservation, giving the Agents permission to search for the firearm. The rifle was not found. During the search for the firearm., Mr. Roy received a telephone call from Mia Thompson stating that she removed the rifle from Roy's residence to take it to a friend's house next door. Special Agent Hodapp then retrieved the firearm from Ms. Thompson.

5. The Defendant was convicted of Burglary in the Second Degree in Clearwater County District Court on June 21, 1999. The Defendant was convicted of the felony crime of violence of Terroristic Threats on January 22, 2002 in Clearwater County District Court file KX-01-317.

6. On October 23, 2006, Defendant filed a motion to dismiss for lack of subject matter jurisdiction.

7. On April 4, 2007, Defendant filed a renewed motion to dismiss for lack of subject matter jurisdiction.

CONCLUSIONS OF LAW

1. Defendant's conduct was unequivocally prohibited by Minnesota Statute §609.165, and the conduct prohibited was criminal/prohibitory.

2. In accordance with State v. Jones, Minn. No. A05-365 (March 22, 2007), violation of the felon in possession of a firearm statute is a criminal/prohibitory' offense, and thusly, the State has subject matter jurisdiction to prosecute the Defendant.

3. The treaty rights do not deny the State the jurisdiction to prosecute Defendant as a convicted felon for possessing a firearm.

Based on the above Conclusions of Law, the Court makes the following:

ORDER:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied.

Dated: July 2, 2007

s/Shari R. Schluchter
Judge of District Court

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

Case No. K1-06-1026

FILED

APR 04 2007

DISTRICT COURT

BELTRAMI COUNTY

MINNESOTA

State of Minnesota,

Plaintiff,

vs.

Joel Anthony Roy,

Defendant.

ORDER DENYING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The above-entitled matter came on for an omnibus hearing before the undersigned on December 5, 2006 pursuant to Defendant's motion

to dismiss the charge of Felon in Possession of a Firearm in violation of Minn. Stat. §609.165. The Plaintiff was represented by Assistant Beltrami County Attorney Randall Burg. Frank Bibeau, Esq., appeared on behalf of and with the Defendant, Joel Roy.

Based upon the arguments of counsel, the files and records herein and applicable law, the Court makes the following:

FINDINGS OF FACT

1. On October 21, 2005, investigators with the Minnesota Bureau of Criminal Apprehension were involved in the investigation of a gunshot victim homicide at 16678 64th Avenue in Cass Lake, Minnesota. During the investigation, a number of spent 7.62 x 39mm ammunition, ammunition used for semi-automatic assault rifles such as the AK-47 or SKS rifle, cases were found.

2. Investigators learned that the Defendant, a neighbor of one of the suspects in the shooting, possessed a SKS rifle.

3. When questioned by law enforcement during their homicide investigation, Joel Roy admitted to Special Agent Phil Hodapp of the Minnesota Bureau of Criminal Apprehension that he possessed a SKS rifle and stored it in a closet at his residence.

4. The Defendant took Special Agent Phil Hodapp and Special Agent Stan Leach to his residence, giving the Agents permission to search for the firearm. The rifle was not found. During the search for the firearm, Mr. Roy received a telephone call from Mia Thompson stating that she removed the rifle from Roy's residence to take it to a friend's house next door. Special Agent Hodapp then retrieved the firearm from Ms. Thompson.

5. The Defendant was convicted of Burglary in the Second Degree in Clearwater County District Court on June 21, 1999. The Defendant was convicted of the felony crime of violence of Terroristic Threats on January 22, 2002 in Clearwater County District Court file KX-01-317.

CONCLUSIONS OF LAW

1. Defendant's conduct was unequivocally prohibited by Minnesota Statute §609.165, and the conduct that was prohibited was criminal/prohibitory.

2. In accordance with State v. Jones, Minn. No. A05-365 (March 22, 2007), violation of the felon in possession of a firearm statute is a criminal/prohibitory offense, and thusly, the State has subject matter jurisdiction to prosecute the Defendant.

ORDER:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied.

Dated: April 4, 2007 s/Shari R. Schluchter

Judge of District Court

Minn. Stat. 609.165 RESTORATION OF CIVIL RIGHTS; POSSESSION OF FIREARMS.

Subdivision 1. Restoration.

When a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

Subd. 1a. Certain convicted felons ineligible to possess firearms.

The order of discharge must provide that a person who has been convicted of a crime of violence, as defined in section 624.712, subdivision 5, is not entitled to ship, transport, possess, or receive a firearm for the remainder of the person's lifetime. Any person who has received such a discharge and who thereafter has received a relief of disability under United States Code, title 18, section 925, or whose ability to possess firearms has been restored under subdivision 1d, shall not be subject to the restrictions of this subdivision.

Subd. 1b. Violation and penalty.

(a) Any person who has been convicted of a crime of violence, as defined in section 624.712,

subdivision 5, and who ships, transports, possesses, or receives a firearm, commits a felony and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both.

(b) A conviction and sentencing under this section shall be construed to bar a conviction and sentencing for a violation of section 624.713, subdivision 2.

(c) The criminal penalty in paragraph (a) does not apply to any person who has received a relief of disability under United States Code, title 18, section 925, or whose ability to possess firearms has been restored under subdivision 1d.

Subd. 1c.

[Repealed, 1999 c 61 s 2]

Subd. 1d. Judicial restoration of ability to possess firearm by felon.

A person prohibited by state law from shipping, transporting, possessing, or receiving a firearm because of a conviction or a delinquency adjudication for committing a crime of violence may petition a court to restore the person's ability to possess, receive, ship, or transport firearms and otherwise deal with firearms.

The court may grant the relief sought if the person shows good cause to do so and the person has been released from physical confinement.

If a petition is denied, the person may not file another petition until three years have elapsed without the permission of the court.

Subd. 2. Discharge.

The discharge may be:

(1) by order of the court following stay of sentence or stay of execution of sentence; or

(2) upon expiration of sentence.

Subd. 3. Applicability.

This section does not apply to a forfeiture of and disqualification for public office as provided in section 609.42, subdivision 2.

History:

1963 c 753 art 1 s 609.165; 1973 c 654 s 15; 1975 c 271 s 6; 1978 c 723 art 1 s 15; 1986 c 444; 1987 c 276 s 1; 1994 c 636 art 3 s 9; 1996 c 408 art 4 s 7; 1998 c 376 s 5; 2003 c 28 art 3 s 3-5; 2005 c 83 s 1